APPENDIX

JUDGMENT/ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

81-1357

At a States Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 14th day of June, one thousand nine hundred and eighty-two.

Present:

Hon. Leonard P. Moore,
Hon. Henry J. Friendly,
Hon. James L. Oakes,
Circuit Judges.

United States of America,
Appellee,

v.

Louis Ippolito,
Appellant.

ORDER

Louis Ippolito appeals from a judgment of conviction on charges of distributing and possessing with intent to distribute

marijuana, 21 U.S.C. §841(a)L1); 18 U.S.C. §2, and conspiracy to import and distribute marijuana, 21 U.S.C. §8846, 963, following a jury trial in the United States District Court for the Eastern District of New York, Edward R. Neaher, *Judge*. We affirm.

Appellant's principal argument is that the district court erred in denying a hearing on whether disclosures to the government by Ippolito's former defense counsel violated due process or the right to effective assistance of counsel. Before the trial commenced, Ippolito moved for dismissal of the indictment or any other appropriate remedy, because of improper breaches of lawyer-client confidentiality by Stanley Arkin, Esq., who had been Ippolito's defense counsel during the early pre-trial period, and the prosecutor's knowing exploitation of information obtained by way of Arkin's indiscretion. The gist of Ippolito's allegations was as follows: Arkin and his firm had represented various of the alleged conspirators for a substantial period of time prior to the indictment. He was introduced and became counsel to Ippolito in February 1979, around the time of the original (April 12, 197) [sic] indictment (later superseded by an almost identical indictment) in the instant case. Arkin is said subsequently to have disclosed to other of his clients, including Robert Seyfert, information that had been revealed to him in confidence by Ippolito, though we are not advised what this information was. Arkin and Seyfert are then said to have disclosed such information to the prosecutor, including conversations between Ippolito and his counsel that had surrepitiously been tape recorded by Seyfert, in order to obtain a more favorable plea bargain for various of Arkin's clients, including Robert Seyfert, Alan Seyfert, and Frank Natiello. The prosecutor is said to have accepted the information knowing that its disclosure was a breach of attorney-client confidentiality.

Appendix

In opposition to Ippolito's motion, the Eastern District of U.S. Attorney submitted an affidavit in which he outlined his office's participation in the case and indicated that, as far as he was aware, neither Arkin nor any member of his firm had disclosed information obtained from Ippolito to him or any other government official, including anyone involved in the case in the U.S. Attorney's office in the Western District of Texas. Following oral argument, Judge Neaher denied the defendant's motion without allowing a hearing with respect to the extent of improper disclosures and the government's involvement.

Unauthorized disclosures of confidentiality information by Ippolito's former defense counsel would have been a breach of lawyer-client confidentiality and possibly a denial of effective assistance of counsel. *Cf. Cuyler* v. *Sullivan*, 446 U.S. 335, 350 (1979) (conflict of interest on part of defense counsel). But Ippolito's vague allegations in advance of trial—that Arkin's misconduct resulted in the prosecutor's acquisition of inculpatory evidence that would not otherwise have been obtained and that the evidence contributed to the prosecutor's case against Ippolito—were not sufficiently colorable to warrant a full evidentiary hearing on the issue. The allegations were wholly conclusory; nowhere did they set forth the nature of the confidentiality information, or how and when it was confided to or disclosed by Arkin. Therefore, the district court's denial of defendant's motion without a hearing was not an abuse of discretion.

We also find little merit to appellant's other argument. The testimony of Special Agent Chambliss, to which defendant objected as "bad character" evidence under Fed. R. Evd. 404(b), was properly admitted as direct proof of defendant's involvement in the marijuana conspiracy. The inclusion of an additional count

in the superseding indictment was also permissible, since it did not in any way evidence prosecutorial vindictiveness or "chill" defendant's right to stand trial.

Judgment affirmed.

Circuit Judges.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

Constitution of the United States:

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment for a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."